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No. 94-623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, Her engines, Etc.
and M.H. MARITIMA, S.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("The MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by Vimar Seguros Y Reaseguros, S.A. Petitioners have consented to the filing of the accompanying *amicus curiae* brief but *such consent has not been given, although requested, from Respondent*. Leave to file is therefore sought pursuant to Rule 37.2 of the Court.

NATURE OF APPLICANT'S INTEREST

The MLA's strong interest in this matter reflects the purposes described in its Articles of Association:

> to promote uniformity in [the] enactment and interpretation [of maritime law of the United States], to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

Comprised of more than 3600 attorneys, academicians, and others with vital interests in maritime law, The MLA represents a broad constituency inclusive of ship and cargo owners, charterers, shippers, forwarders, seamen, longshoremen, passengers, insurers, and others.

In fulfilling its objectives, The MLA has been active in both domestic and international matters since its founding in 1899.

On the domestic front it was active in sponsoring the two statutes that are at the focus of the Petitioner's Case: the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act[2]. The MLA has participated in and remains active in the formulation of other maritime legislation,[3] as well.

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-15.

3 *E.g.* Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention on the International Regulations for Preventing Collisions at Sea, 28 U.S.T. 3459, as amended, T.I.A.S. 10672, Oct. 20, 1972, reprinted in 6 ***Benedict on Admiralty***, Doc. No. 3-4 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); see 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

As a constituent member of the Comité Maritime International ("CMI") The MLA has maintained a high profile in international legal matters, working with the fifty-two other national law associations that comprise the CMI.[4] These efforts have been in furtherance of the CMI's singular purpose as described in Article 1 of its constitution:

> The Comité Maritime International is a non-governmental international organization, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects.

In addition to its CMI activities, The MLA has also been active in several projects undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

The MLA's dedication to the promotion of uniformity in maritime law has been repeatedly expressed by its membership and through the efforts of its standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with

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4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at The MLA Annual Spring Meeting on April 25, 1975.[5] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by The MLA on several occasions, most recently in a 1986 resolution.[6]

The MLA has, in furtherance of the uniformity policy and its resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[7] It is the policy of The MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law. Such a situation exists in this case. A conflict between circuits, as is present here, not only destroys the uniformity of U.S. maritime law but also creates unpredictability in an area in which consistency is essential.

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5 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

6 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

7 *E.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("The MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari filed by Vimar Seguros Y Reaseguros, S.A.

INTEREST OF AMICUS CURIAE

The Applicant's interest is stated in the accompanying Motion.

SUMMARY OF ARGUMENT

The Applicant argues neither for nor against Petitioner's position. This *amicus* underscores The MLA's concern that this conflict between federal circuits be resolved in the interest of maintaining the essential uniformity of maritime law.

Uniformity of law is one of the principal underpinnings of admiralty law. This notion, imported into this country in its earliest days, is of critical importance to those engaged in oceanic commerce under the purview of the U.S. Carriage of Goods by Sea Act. This uniformity is threatened however, by a split of authority between the First and Eleventh Circuits which, at bottom, pertains to the interrelationship of the U.S. Carriage of Goods by Sea Act and the Federal Arbitration Act. Only resolution by this Court will restore the uniformity and predictability of the manner in which these statutes are applied.

ARGUMENT

1. THE EXPRESS INTENTION OF BOTH CONGRESS AND THIS COURT TO PROVIDE FOR A UNIFORM MARITIME LAW, IS THWARTED BY A DIVISION OF TWO CIRCUITS

a. Uniformity of Law is the Paramount Goal of Maritime Law in General, and of the Carriage of Goods by Sea Act in Particular.

Uniformity of law was the precise goal behind the adoption of the Carriage of Goods by Sea Act (46 U.S.C. § 1301, *et seq.*), which is the codification of an international treaty, known as the Hague Rules, to which more than 90 countries now subscribe.[1] As one commentator explained:

[1] This includes those countries that have signed and ratified the Convention as amended by the Visby Protocol.

> The legislative history of the statute makes clear that COGSA's prime purpose was (as the official title of the Hague Rules explains) the "unification of certain rules of law relating to bills of lading," not only within the United States but throughout the world. During the floor debates, the only reason given for enacting COGSA was the need to implement the Hague Rules to achieve uniformity regarding bills of lading. Both the Senate and House reports on the bill claim uniformity as the legislation's most important purpose. Testimony stressing that goal fills the congressional hearings.

Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1271 (1989) (footnotes omitted).

The instant dispute involves Section 3(8) of COGSA, 46 U.S.C. § 1303(8), a key provision in assuring that its carefully struck balance of rights and obligations between shipowners and shippers is not evaded by operation of contract.[2]

Section 3(8) provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

In other words, it is a provision intended to help assure that a uniform international law remains so in its application.

[2] COGSA, like the Hague Convention, embodies a careful balancing of rights, duties, and liabilities of shippers and shipowners. We refer to Petitioner's Brief in support of its Petition for a Writ of Certiorari at 3 for a discussion of this aspect of the statute. *See also* Michael J. Bonnell, *International Uniform Law in Practice—Or Where the Real Trouble Begins*, 38 Am. J. Comp. L. 865, 883 (1990).

COGSA's devotion to uniformity in the maritime law builds on a long-standing concern of this Court, which was transplanted from English law in the earliest days of the nation.[3] Justice Storey, sitting as circuit justice, urged that the very broadest interpretation of the Constitution's Admiralty Clause was compelled by, "[t]he advantages resulting to the commerce and navigation of the United States from a uniformity of rules and decisions in all maritime questions." *De Lovio v. Boit*, 7 Fed. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815).

Uniformity of law was the compelling factor in the Court's consideration of early admiralty cases. Writing in *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), Chief Justice Marshall, referring to the considerable body of admiralty jurisprudence predating the Republic, noted:

> A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.

26 U.S. (1 Pet.) at 545-46.

This Court has repeatedly endorsed this totemic principle ever since; in 1875, opining on the nature and paramountcy of admiralty jurisdiction, Mr. Justice Bradley observed that:

> No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on nature

[3] England's maritime law was itself a product of a maritime code shaped by the desire for the commercial states of Europe for common rules to apply in sea-borne commerce. 7A *Moore's Federal Practice*, 2012-13; Gilmore & Black, *The Law of Admiralty*, 6-7 (2d ed. 1975).

> reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations.

The Lottawanna, 88 U.S. (21 Wall.) 558, 572-73 (1875).

In sum, the Court has consistently "effectuated 'the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' ' " *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1991) (*quoting Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970), *and The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).

In this context, the incorporation of the Hague Rules into U.S. law, via COGSA, is nothing less than the continuation of a centuries old effort to develop a body of law applicable to all oceanic commerce. In fact, COGSA has been described as the "rare example of a federal statute that Congress passed with more concern for its uniformity than its content." Sturley, *Supreme Courts Certiorari Jurisdiction*, 67 Tex. L. Rev. at 1271.

b. The Court Below Has Held That COGSA is in Conflict with Another Statute of Great National Interest, The Federal Arbitration Act.

The necessity for the Court's attention to this case is not propelled by COGSA considerations alone. The existing conflict pertains to the manner in which section 3(8) of COGSA coexists with another statute of significant interest to the shipping community and to the Court, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14.[4] With the aid of the courts, a

[4] Maritime arbitration itself has long roots. It was familiar at least as far back as Roman times. *See, e.g., Kulukundunis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-983 (2d Cir. 1942). Agreements to arbitrate were valid in admiralty even before passage of the FAA, reflecting long standing practice. See, *Red Cross Line v. Atlantic*

body of federal substantive law has developed to effectuate the liberal federal policy towards arbitration. This approach has been endorsed by the Courts of Appeals, and, ultimately this Court. *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983). This policy is carefully focused. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Servs. v. Board of Trustees*, 489 U.S. 468, 476 (1989).

It is against the backdrop of these two powerful federal interests—promotion of uniformity in the maritime law and the promotion of a liberal arbitration policy—that the instant dispute presents itself.

c. The Conflict of Statutes and of the Circuits is Disruptive of Maritime Commerce.

The juxtaposition posed by the Court of Appeals in the present case (which, in requiring foreign arbitration of the dispute, would effectively subordinate operation of COGSA § 3(8)) and *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576, (11th Cir.) *cert. denied*, 488 U.S. 916 (1988) (under which a foreign arbitration provision would be nullified by COGSA § 3(8)) manifests a long simmering division of opinion on the part of the district courts.[5] The practical effect of this unsettled state of law has been to deprive maritime commercial interests of precisely those elements the Court has long endeavored to propagate: certainty, predictability, and uniformity. Instead, carriers and traders now confront a Janus-faced state of law where shippers once confident of COGSA's protections can find their disputes unceremoniously consigned to arbitral fora

Fruit Co., 264 U.S. 109, 122 (1924). Arbitration of maritime disputes in England is recorded as early as 1320. *Id.* at 122 n.3.

[5] These opposing lines of cases are detailed in the Petition at 23 n.18.

in remote places, where unfamiliar or unfavorable rules of engagement apply, and carriers relying on the FAA can find themselves hauled into the U.S. courts despite their carefully drafted arbitration clauses.[6]

Bills of lading and ship charters routinely include arbitration clauses. While New York, London, and Paris are familiar designations, many other commercial centers are seeking to offer arbitral dispute resolution facilities, evidenced by the numerous alternative venue designations to be found in chartering and shipping documents.[7] Typically, a single sale and shipment, whether of a tanker-load of crude or a container of cornflakes, may involve, in addition to a sales contract, one or more bills of lading and ship charters. The fact that a shipper may not be a direct party to all of this documentation does not necessarily shield it from the provisions of this documentation. This is precisely the problem presented in the present case.

Without knowing which of the two approaches will apply, shippers and carriers face uncertainties that will be translated

[6] While the advantage of arbitration are well known and widely held, not all arbitral fora are equal—at least in terms of competence, experience and efficiency. In the case of one major U.S. trading partner, Japan, arbitration can be both slow and costly. The process is heavily influenced by Japanese distaste for litigation. *See, generally*, Comment, *Commercial Arbitration Between American and Japanese Business: A Japanese Perspective*, 39 Kan. L. Rev. 223, 228, n.30-31 (1990).

In Mexico, with which trade with the U.S. is burgeoning, arbitration, though long established, remains problematic. Jeffrey J. Mayer, *Recent Mexican Arbitration Reform: The Continued Influence of the "Publicistas"*, 47 U. Miami L. Rev. 913, 947-49 (1993). Arbitration decisions in Russia, have, in least certain instances have left it isolated from the rest of the commercial world. Michael J. Bonnell, *International Uniform Law in Practice,—Or Where the Real Trouble Begins*, 38 Am. J. Comp. L. 865, 874 (1990).

[7] Examples, found in standard form bills of lading include Valparaiso, Chile (Compania Chilean De Navegacion Interoceanica S.A.) and Sweden (Scanfreight).

into expensive litigation. The resulting litigation will do little either to advance the important federal interests in the uniformity of maritime law or to facilitate private arbitration efforts.

Litigation stemming from this uncertainty can impose further contortions on legislative intent. This fear is neither speculative nor imagined and is framed in bold relief by two very recent decisions that emphasize the unsatisfactory state of affairs now facing the shipping community.

Very recently, an Oregon district court ruled that Kanematsu, the consignee of cargo carried from New Orleans to Japan, was bound by bill of lading term mandating London arbitration. *Kanematsu Corp. v. M/V Gretchen W*, Civ. No. 93-1437 (D. Ore. Sept. 16, 1994).[8] Kanematsu had purchased the cargo from a grain merchant, Louis Dreyfus Corporation; the terms of sale obligated Dreyfus to ship the grain at its expense to Japan. Dreyfus chartered the GRETCHEN W and loaded the cargo, which subsequently suffered in-transit heating damage, thus triggering a lawsuit by Kanematsu against the vessel interests. Typical of sales of this sort, Kanematsu was not an actual party to the bill of lading, much less to the ship charter.[9] Kanematsu argued, *inter alia*, that London arbitration constituted precisely the sort of liability-lessening term prohibited by Section 3(8).[10] The Magistrate found the First Circuit's decision in the present case and the "strong federal policy favoring arbitration" to be persuasive elements and ordered the dispute be arbitrated in London. Findings and

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[8] Findings and recommendations by Magistrate Judge Stewart, "So Ordered" by United States District Judge Jones on September 26, 1994.

[9] The GRETCHEN W was chartered on a voyage basis from the time charterer, Hyundai. Hyundai had time chartered the ship from its owner, Black Stallion. *Kanematsu*, Findings and Recommendations, at 3.

[10] COGSA applied to the Kanematsu bill of lading by virtue of a clause paramount therein.

Recommendations at 12. Unstated in the opinion is the prospect that the plaintiff may now find its arbitration claim impaled on English's one year statute of limitation. The events which are the subject of *Kanematsu's* complaint date from December 22, 1992; the suit was initiated within the one year COGSA statute of limitations, and the findings and conclusions were so ordered on September 26, 1994. Even if an arbitration proceeding could have been commenced the very next day in London, it would have been well after expiration of the one-year limitation date applicable there. Hence it is entirely conceivable that the action will be deemed time barred by London arbitrators.

While the risk of a time bar is not directly addressed in *Kanematsu,* it is at the very center of a contemporaneous decision in the Eastern District of Louisiana. *Japan Sun Oil Co., Ltd. v. M/V Maasdijk*, Civ. No. 94-1383, 1994 U.S. Dist LEXIS 13871 (E.D.La. Sept. 29, 1994). There the plaintiff expressed the fear that once compelled to arbitrate in London, it would be foreclosed by the defendants' invocation of one year statute of limitations, which had run during the course of the Louisiana litigation. The District Court's retention of jurisdiction, "and its authority to address matters unresolved through arbitration, if any, once the London proceedings are concluded," 1994 U.S. Dist. LEXIS 13871, at *22-23, however well intentioned, serves only to add uncertainty and delay to the litigation. Neither the express purposes of COGSA nor of the FAA are well served in the circumstances. The potential dilemma posed by these cases is not solved by the filing of protective proceedings in multiple locations. This adds time and expense and promotes uncertainty, with the prospect of multiple and conflicting decisions regarding a single claim.

To reiterate, The MLA's purpose here is not to attack the decision below. The essential point is simply this: had plaintiffs in the *Kanematsu* and *Maasdijk* cases been able to anticipate arbitration instead of COGSA-based litigation, their

respective remedial efforts would not have been jeopardized. This Court should resolve the conflict.

2. REVIEW BY THE COURT WILL RESTORE UNIFORMITY AND PREDICTABILITY TO MARITIME LAW

Court review is uniquely suited to restoring order to the harmonious co-existence of two important statutes to insure the uniformity of application envisioned by their respective drafters.

A resolution that opts for either the First Circuit approach or Eleventh Circuit approach will have immediate positive effects for all concerned.

Should the Court sanction the Eleventh Circuit's analysis:

1) shippers will have confidence in the fact that Section 3(8) will continue to override foreign arbitration provisions and leave shippers free to litigate their claims in the U.S. courts;

2) carriers will factor the strategic implications of U.S. litigation in their claims handling activities;

3) U.S. Courts would maintain their role in COGSA jurisprudence.

Should the Court opt to affirm the decision below:

1) shippers will know that they must be vigilant in reviewing shipping documentation to ascertain whether they may be subject to a foreign dispute resolution process;

2) shippers may have an opportunity to negotiate an alternative forum or a freight rate to reflect the imposition of a foreign arbitral forum;

3) carriers would know to be vigilant to insert foreign arbitration clauses should they find them preferable to the prospect of U.S. litigation;

4) U.S. Court dockets would be reduced to the extent that cases are resolved in foreign arbitral fora.

In either case, the necessity to repeatedly litigate the same issue, *viz.*, which approach will prevail, evaporates. Moreover, cases are much more likely to settle with the benefit of a clearer legal landscape, which the Court's attention would bring to the issue. Finally, shippers will be able to avoid the check-mate scenario wherein a U.S. Court orders a claim to a foreign arbitral forum in which the claim has become time-barred.

3. REVIEW BY THE COURT COULD BE HELPFUL TO THE RESOLUTION OF AN INTERNATIONAL CONFLICT IN THE MARITIME LAW.

The Court's attention to the conflict is warranted, not out of blind or rote considerations for uniformity, but by concerns that extend to international commerce. As noted above, COGSA is our statutory enactment of an international convention. Due to the status of the U.S. as a trading power, any major COGSA conflicts within the U.S. have important consequences for parties well beyond our own shores. In sum, the Court's decision to entertain this matter will have deep and important reverberations in global commerce. This is important because, while uniformity may be the goal, it is inevitable that certain differences in the application of the rules will develop, resulting in an international conflict of law. Just such a conflict has developed around § 3(8) as courts in foreign countries have taken divergent views on the extent to which Article 3(8) of the Hague Rules (§ 3(8) of COGSA, 46 U.S.C. §1303(8) prohibits clauses such as these. Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflict of Interpretation*, 27 Va. J. Int'l L. 729, 775-776. Action by this Court could be highly influential in resolving this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 4, 1994

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